UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

VERMONT PURE HOLDING, LTD., Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	03-11465-DPW
	)	
NESTLÉ WATERS NORTH AMERICA INC., NESTLÉ SA, Defendants.	)	

MEMORANDUM AND ORDER
September 9, 2004

Plaintiff Vermont Pure Holding, Ltd. ("Vermont Pure") brings this action against Nestlé Waters North America ("Nestlé") under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), and multiple state law unfair competition statutes. Vermont Pure alleges that Nestlé's commercial advertising regarding the source, nature, and purity of Nestlé's Poland Springs brand bottled water contains false or misleading statements, and that as a result, Vermont Pure, a competitor of Nestlé's in the bottled water industry, suffered damages. Nestlé now moves to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.[1]

[1]Vermont Pure has voluntarily dismissed the claims originally brought against Nestlé's parent company, Nestlé S.A., without prejudice or costs.

I. BACKGROUND

A. Facts

The following facts are drawn from Vermont Pure's complaint. In 1854, Hiram Ricker began bottling spring water from a bedrock spring on Ricker Hill in Poland, Maine. Compl. ¶¶ 7-8. In the 1860's the Ricker family opened a resort on the property, using the spring as mineral water therapy, and in the 1880's, it built a water bottling plant at the spring.[2] Id. ¶ 8. The resort and bottled water sales thrived through the 1960's, when the spring failed to produce sufficient water to sustain business. Id. As a result, the bottling plant was closed. Id. Ground water eventually ceased to flow out of the spring, and its use was discontinued altogether in 1967. Id.

Following the closing of the resort and bottling plant, the Ricker family divided and sold the land surrounding the spring. Id. ¶ 10. It sold to the state of Maine a 400-acre plot, which was subsequently named "Lower Range Pond Park," and in 1973, it sold an additional 400-acre parcel, located between the park and the resort, to a company called Waters of Maine. Id. Waters of Maine installed wells on its property and began drawing ground water from the Lower Range Pond Aquifer, which it marketed and

[2] In its complaint, Vermont Pure makes a number of allegations regarding waste disposal at the resort. While these allegations are relevant to Vermont Pure's allegations concerning the purity of Poland Springs water, the specific details tracing the location of the source of Poland Springs water back to particular locations used as waste disposal sites of the resort are not pertinent to the present motion, and I omit those details here.

sold as "spring water." Id. Waters of Maine subsequently constructed a new bottling plant (the "Plant") on its property.

In 1979, Perrier Co. ("Perrier"), purchased assets of Waters of Maine and built a large addition to the Plant. Id. ¶ 11. In 1993, Nestlé S.A. purchased Perrier by hostile takeover, and in 1994, Nestlé, as the marketing and bottling arm of Nestlé S.A., expanded the Plant and installed additional production wells. Id. ¶ 12. Nestlé also purchased Garden Spring Water Company, which was located several miles from the Plant. Id. Around 1993 or 1994, Nestlé began the bottling and sale of Poland Spring water. Id. ¶ 13.[3]

In its complaint, Vermont Pure alleges that "Nestlé's commercial advertisements regarding the source, nature and purity of Poland bottled water contain false or misleading statements." Id. ¶ 35. Specifically, Vermont Pure contends that Nestlé's advertising and marketing materials for Poland Springs water are false or misleading insofar as they state, inter alia, that the water is "spring water" which comes from the Poland Spring. Id. ¶ 35. Vermont Pure contends that Poland Spring water is not "'spring water' in any regulatory, hydrological or plain meaning sense of the word," id. ¶ 15,[4] and that it "has never, ever been

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[3]Compl., at 5. Due to a numbering error in the complaint, there are two sets of ¶¶ 13-20. To identify the precise location for the paragraphs of the complaint referenced in this Memorandum, a citation to the page on which any paragraph having duplicate numbering is found will be provided by footnote.

[4]Compl., at 5.

extracted from the 'Poland Spring' despite its pervasive advertising and marketing to that effect." Id. ¶ 13.[5] Indeed, Vermont Pure alleges that Poland Spring water does not even come from the same acquifer as the original source.[6] Id. ¶ 14.[7] Moreover, Vermont Pure alleges that Nestlé falsely or misleadingly markets and advertises Poland Spring water as originating in "some of the most pristine and protected sources deep in the woods of Maine." Id. ¶ 35.

Vermont Pure alleges that Nestlé retrieves ground or well water, not "spring water," from all four publicly-disclosed sources of water.[8] Id. ¶ 15.[9] Additionally, Vermont Pure alleges on information and belief that Nestlé withdraws water directly from the bottom of Range Pond in Poland, Maine and also has, on numerous occasions, trucked water from undisclosed out-of-state sources. Id. ¶ 18.[10]

Regarding its allegations related to the purity of Poland Spring water, Vermont Pure contends that

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[5]Compl., at 5.

[6]Vermont Pure alleges that the water is pumped from the ground from a series of gravel-packed wells, some of which, such as a production well from the former Garden Spring Water Company, are located several miles from the original location of Poland Spring. Id. ¶ 30.

[7]Compl., at 5.

[8]Two sources are in Poland, Maine, one is in Fryeburg, Maine, and one is in Hollis, Maine. Compl. ¶ 15, at 5.

[9]Compl., at 5.

[10]Compl., at 6.

> Nestlé's massive production well techniques and practices for withdrawing ground water systematically invade natural flow lines of groundwater supplies, causing the actual or potential contamination of groundwater and well water by the infiltration of contaminated water sources or infiltration of surface water (which frequently contains organic or inorganic contaminants).

Id. ¶ 16.[11]

II. DISCUSSION

A. Standard of Review

In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must take well-pled factual allegations in the complaint as true and must make all reasonable inferences in favor of the plaintiff. Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993). The court, however, need not credit "bald assertions, unsupportable conclusions, or opprobrious epithets." Chongris v. Bd. of Appeals, 811 F.2d 36, 37 (1st Cir. 1987). In all events, dismissal under Rule 12(b)(6) is only appropriate if the complaint, so viewed, presents no set of facts justifying recovery. Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999).

B. Lanham Act Claim

The central issue raised by this motion to dismiss concerns the proper relationship between the opportunities for private

[11]Compl., at 5-6. Vermont Pure additionally makes a number of factual allegations concerning consumer complaints about Poland Spring water and the water's non-compliance with Massachusetts Public Health Department and the Environmental Protection Agency standards, as well as Nestlé's attempts to rectify those problems. Id. ¶ 13-21, at 7-10. I need not, however, delve into the specifics of those allegations on this motion to dismiss.

litigation to enforce the general concerns with false advertising provided by the Lanham Act, on the one hand, and the regulatory regime defining "spring water" under the Federal Food Drug & Cosmetic Act ("FDCA"), 21 U.S.C. § 301, et seq., on the other. Nestlé argues that Vermont Pure's suit constitutes nothing more than a repackaged attempt to use the Lanham Act to enforce the FDCA and accompanying Food and Drug Administration ("FDA") misbranding regulations and should be barred because the FDCA does not confer a private cause of action for such enforcement. Vermont Pure responds that its Lanham Act claim does not directly implicate the FDCA. Vermont Pure contends that while the FDA regulations defining "spring water" may be implicated in this action, the Lanham Act claim is separate from and not dependant on such standards.

Section 43(a) of the Lanham Act provides a civil cause of action for misleading or false statements in advertising. Specifically, § 43(a) states:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--
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> . . .
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be

damaged by such act.

15 U.S.C. § 1125(a).

To prove a § 43(a) false advertising claim, a plaintiff must show "a false or misleading description of fact or representation of fact by the defendant in a commercial advertisement about its own or another's product."[12] Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co., 228 F.3d 24, 33 n.6 (1st Cir. 2000). Viewed in isolation, then, Vermont Pure's allegations that Nestlé's misrepresented the purity, nature, and source of Poland Spring water in its marketing and promotional materials are sufficient to state the formal elements of a false advertising claim under § 43(a).

However, as Nestlé points out, use of the term "spring water" on bottled water is regulated by the FDA. Indeed, FDA regulations specifically define the term:

> The name of water derived from an underground formation from which water flows naturally to the surface of the earth may be "spring water." Spring water shall be collected only at the spring or through a bore hole tapping the underground formation feeding the spring. There shall be a natural force causing the water to flow to the surface through a natural orifice. The location of the spring shall be identified. Spring water

[12] The plaintiff must also show that: the statement actually deceives or has the tendency to deceive a substantial segment of its audience; the deception is material, in that it is likely to influence the purchasing decision; the defendant placed the false or misleading statement in interstate commerce; and the plaintiff has been or is likely to be injured as a result of the false or misleading statement, either by direct diversion of sales from itself to defendant or by a lessening of goodwill associated with its products. Clorox, 228 F.3d at 33 n.6. Nestlé does not dispute that Vermont Pure has sufficiently pled these additional formal elements.

> collected with the use of an external force shall be from the same underground stratum as the spring, as shown by a measurable hydraulic connection using a hydrogeologically valid method between the bore hole and the natural spring, and shall have all the physical properties, before treatment, and be of the same composition and quality, as the water that flows naturally to the surface of the earth. If spring water is collected with the use of an external force, water must continue to flow naturally to the surface of the earth through the spring's natural orifice. Plants shall demonstrate, on request, to appropriate regulatory officials, using a hydrogeologically valid method, that an appropriate hydraulic connection exists between the natural orifice of the spring and the bore hole.

21 C.F.R. § 165.110(a)(2)(vi).

The pivotal question, therefore, is whether and, if so, to what extent, FDA regulations concerning "spring water" impact Vermont Pure's otherwise sufficiently-pled Lanham Act claim. The issue may be labeled a problem of preemption or framed, as Nestlé does in its briefs, in terms of the viability of a private cause of action to enforce the FDCA; but the core inquiry is whether Vermont Pure can base an action on Nestlé allegedly improper use of a term that is explicitly defined by FDA regulations.

As an initial matter, it is clear that the FDCA does not confer a private right of action to enforce directly regulations such as those for bottled water -- or more specifically to correct misbranding water as "spring water."[13] See Mendes v.

[13]The FDCA provides:

> Except as provided in subsection (b) of this section, all such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States.

21 U.S.C. § 337(a). Subsection (b) allows states to bring enforcement actions in specified instances.

Medtronic, Inc., 18 F.3d 13, 19 n.4 (1st Cir. 1994); Rodriguez v. SK & F Co., 833 F.2d 8, 9 (1st Cir. 1987). Moreover, this inability to enforce privately the FDCA includes allegations of a failure to disclose that the FDA has not approved a product. See Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1139 (4th Cir. 1993) (placing drugs on market did not falsely represent FDA approval for purposes of Lanham Act), cert. denied, 510 U.S. 1197 (1994); Ethex Corp. v. First Horizon Pharm. Corp., 228 F. Supp. 2d 1048, 1055 (E.D. Mo. 2002) (dismissing Lanham Act counterclaim where defendant claimed use of term "generic" implied FDA approval); see also PDK Labs. v. Friedlander, 103 F.3d 1105, 1113 (2d Cir. 1997).

Beyond these basic propositions, however, the existing case law becomes somewhat murky. Nestlé contends that the simple fact that the FDA explicitly regulates the use of the term "spring water" for bottled water products, bars any private causes of action pertaining to such use. As Vermont Pure notes, however, mere FDA regulation of a term does not necessarily bar all Lanham Act claims that pertain to that term. See Summit Tech., Inc. v. High-Line Med. Instruments Co., 933 F. Supp. 918, 933 (C.D. Cal. 1996) ("[F]alse statements are actionable under the Lanham Act, even if their truth may be generally within the purview of the FDA."); Ethex, 228 F. Supp. 2d at 1055 (E.D. Mo. 2002) ("False statements, however, are actionable under the Lanham Act even if they involve FDA-regulated products."). Thus, for instance, a

false affirmative statement that a product is FDA-approved would be actionable under the Lanham Act, even though the product is regulated by the FDA. Summit, 933 F. Supp. at 933 n.7.

The key distinction in determining whether a Lanham Act claim can be based on a FDA-regulated product thus is not whether the product at issue is regulated by the FDA but more specifically whether the claim requires direct interpretation and application of the FDCA or FDA regulations.

In Sandoz Pharm. v. Richardson-Vicks, Inc., 902 F.2d 222 (3d Cir. 1990), plaintiff brought a Lanham Act claim alleging that the defendant falsely labeled ingredients in its cough syrup product "inactive." The court found that the claim was not actionable because the plaintiff was unable to prove that the labeling was false. Id. at 231-32. The court stated that whether the ingredients at issue were "active" or "inactive" was properly resolved by the FDA. Id. The court noted that because the FDA had not yet made such a determination, the court could not determine whether the defendant's labeling was false without directly interpreting FDA regulations. Id. at 231. It declined to do so, stating: "Because 'agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise.'" Id. (quoting McKart v. United States, 395 U.S. 185, 194 (1969)).

Vermont Pure contends that Sandoz is inapplicable because here, unlike in Sandoz, the determination of whether Poland

Spring water is properly "spring water" does not depend exclusively on FDA regulations. Indeed, in its complaint Vermont Pure alleges that Poland Spring water is not "'spring water' in any regulatory, hydrological or plain meaning sense of the word," and it offers the "generally accepted scientific definition" of a "spring" from the American Geological Institute:

> [a] place where groundwater flows naturally from a rock or the soil onto the land surface on into a body of surface water. Its occurrence depends on the nature and relationship of rocks, especially permeable and impermeable strata, on the position of the water table, and on the topography.

Compl. ¶ 31. Thus, Vermont Pure contends that the FDA definition of "spring water" is only one of several independent reference points for assessing its Lanham Act claim.

Vermont Pure ignores the fact that the Sandoz court considered and rejected a similar claim. In Sandoz, the plaintiff argued that because the defendant claimed that the cough syrup worked the instant it was swallowed, the ingredients at issue had to be active "as a matter of common sense and normal English." The court rejected that argument, stating:

> We decline to find and do not believe that the district court had to find, either "as a matter of common sense" or "normal English," that which the FDA, with all of its scientific expertise, has yet to determine. . . .
>
> Sandoz's position would require us to usurp administrative agencies' responsibility for interpreting and enforcing potentially ambiguous regulations.

Id. at 231.

In Braintree Labs., Inc. v. Nephro-Tech, Inc., No. 96-2459, 1997 WL 94237 (D. Kan. Feb. 26, 1997), the court similarly

refused to apply an ordinary-sense definition to a term expressly defined and regulated by the FDA. The plaintiff in Braintree brought a Lanham Act claim alleging that the defendant improperly used the term "dietary supplement," which is defined in the FDCA. The court dismissed the claim, despite the plaintiff's contention that the defendant's product was not a "dietary supplement" in the "ordinary sense" because the calcium in the product is not intended to be absorbed, stating that "it is not for this court to interpret and apply the statutory definition of 'dietary supplement.'" Id. at *7.

I find Sandoz and Braintree persuasive here. The FDA has explicitly defined the very term, "spring water," on which Vermont Pure's Lanham Act claim is based. Consequently, determining whether Nestlé's use of the term is proper is inextricably bound up with an interpretation of FDA regulations. In Braintree, the problem with allowing a Lanham Act claim based on an outside, independent definition of a FDA-defined term was crystalized given the particular regulations for the term "dietary supplement." As the Braintree court noted:

> [U]under the FDCA, a product is misbranded if it is a "dietary supplement" under the FDCA and that term is not used on its label. 21 U.S.C. § 343(s). Thus, even if it were determined in litigation that [the defendant's product] did not meet some independent, lay understanding of the term "dietary supplement," defendants might not be able to remove the term from its label without violating the FDCA and risking a suit by the FDA. The possibility of such a dilemma demands that classic misbranding claims, such as the one here at issue, be reserved solely for resolution by the FDA.

Id. at *7.

To be sure, in this case, by contrast with Braintree, the FDA regulations for bottled water are more permissive, allowing but not requiring use of the term "spring water" for water that meets the FDA standard. However, the rationale underlying Braintree, while perhaps more salient on the facts of that case, applies with equal force here.

Vermont Pure may indeed be correct that there are plain-meaning, market, geological, hydrological, or other definitions or understandings of the term "spring water" that are independent of the FDA's definition. However, assessing a Lanham Act claim based on such definitions would clearly encroach on the FDCA and FDA regulations and would undermine, if not usurp, FDA authority. Allowing Lanham Act claims arising out of the use of terms specifically defined in the FDCA or by the FDA would result in situations in which construction of a term defined by the FDA would take place in private litigation in the absence of the FDA. This circumstance Congress sought to prevent by specifically vesting enforcement authority in the government. Thus, I follow Sandoz and Braintree, concluding that Vermont Pure's Lanham Act claim is not actionable insofar as it is based on Nestlé's use of the term "spring water."

The Grove Fresh litigation in the Northern District of Illinois does not alter this conclusion. In Grove Fresh I, Grove Fresh Distribs., Inc. v. Flavor Fresh Foods, Inc., 720 F. Supp. 714 (N.D. Ill. 1989), the plaintiff brought a Lanham Act claim alleging that the defendants falsely represented their product as

being "100% orange juice from concentrate." Id. at 715. Judge Bua denied the defendants' motion to dismiss despite the fact that FDA regulations specifically defined the term "orange juice from concentrate":

> The fact that Grove Fresh refers to or relies on an FDA regulation defining orange juice to support its Lanham Act claim is not grounds for dismissal. Although courts have held that there is no private cause of action under the FDCA, Grove Fresh has not brought suit directly under the FDCA or its accompanying regulations. Grove Fresh relies on the FDA regulation merely to establish the standard or duty which defendants allegedly failed to meet. Nothing prohibits Grove Fresh from using the FDCA or its accompanying regulations in that fashion.

Id. at 716.

In refusing to dismiss the claim, the court noted the availability of alternatives to the FDA definition:

> Grove Fresh does not base its claim solely on the FDCA or FDA regulations. Grove Fresh alleges that defendants have violated section 43(a) of the Lanham Act. Even without the FDA regulation defining "orange juice from concentrate," Grove Fresh could attempt to establish a violation of section 43(a). Grove Fresh would simply need to provide other evidence establishing the proper market definition of "orange juice from concentrate." Thus, Grove Fresh has asserted an independent basis for its claim . . . which is sufficient to sustain its cause of action under Count I.

Id.

As an initial matter, I observe that Grove Fresh I is arguably distinguishable on its facts. Because the term at issue there was "100% orange juice from concentrate" and the FDA defined only "orange juice from concentrate," the Lanham Act claim could be said to have turned on whether the product was in fact 100% orange juice, as opposed to whether it fit the definition of "orange juice from concentrate." Characterized in

this way, the Grove Fresh I litigation did not involve misbranding in the same way Braintree did. However, Judge Bua made no such a distinction in Grove Fresh I during his discussion of the claim and the language he did use -- for example, referring to potential market definitions of "orange juice from concentrate" -- suggests that he did not consider this distinction relevant to his conclusion.

To the extent Grove Fresh I stands for the proposition that a Lanham Act claim can be based on a term expressly defined and regulated by the FDA, I find its reasoning unpersuasive. I note that when four Grove Fresh cases in the Northern District of Illinois were consolidated before Judge Zagel for further rulings on motions to dismiss, he considerably refined the basis for denial of the motion to dismiss in Grove Fresh I, stating:

> Judge Bua has held, and I agree, that "[e]ven without the FDCA regulation defining 'orange juice from concentrate', Grove Fresh could attempt to establish a violation of section 43(a) ... Grove Fresh would simply need to provide other evidence establishing the proper market definition of 'orange juice from concentrate.'" This may not be a very promising course for Grove Fresh to undertake. There may, in fact, be no proper market definition of "100% Orange Juice from Concentrate" outside of the FDCA and its regulations, or, if there is, it may be inconsistent with the regulations definition and thus preempted by that definition. Striking all reference to the FDCA regulations leaves a still valid (if hard to prove) complaint.

Grove Fresh Distribs., Inc. v. Everfresh Juice Co., No. C-1118, 1989 WL 152670, at *3 (N.D. Ill. Nov. 29, 1989) (citation omitted) ("Grove Fresh II").

Following Sandoz and Braintree, I take Grove Fresh II but a small step further to conclude that insofar as any market (or

other) definition deviates from the FDA it is, as a matter of law, preempted. Moreover, insofar as a market (or other) definition is identical to the FDA definition, any Lanham Act claim based on such a definition would constitute an impermissible attempt to create a private cause of action to enforce the FDCA or FDA regulations.[14]

The FDCA makes quite clear that the requirements set forth in the FDCA and the regulations of the FDA are exclusive and cannot be overridden by the states:

> [N]o State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce--
>
> (1) any requirement for a food which is the subject of a standard of identity established under section 341 of this title that is not identical to such standard of identity or that is not identical to the requirement of section 343(g) of this title. . .

21 U.S.C. § 343-1(a)(1). Given this asserted authority over defining the requirements for the food and drugs that fall within the purview of the FDCA and given the FDA express undertaking to define "spring water," I find no basis to allow a Lanham Act claim based on the use of that term. The FDA has sole authority in such misbranding cases, and Vermont Pure's only recourse is to petition the FDA, see Sandoz, 902 F.2d at 231 n.10; Am. Home Prods. Corp. v. Johnson & Johnson, 672 F. Supp. 135, 145

[14] Nevertheless, this approach, as noted below, does not foreclose all reference by Vermont Pure to the true source and nature of Poland Spring water. Vermont Pure simply may not bring their specific claim that Poland Spring water is mislabeled with the term "spring water," because such determinations are the proper purview of the FDA.

(S.D.N.Y. 1987), or to try to alter the regulations through the normal notice and comment process. Accordingly, I dismiss Vermont Pure's claims to the extent they are based on Nestlé's use of the term "spring water."

As Vermont Pure notes, however, not all of its Lanham Act allegations implicate the FDCA or FDA. Indeed, several of its allegations do not refer to the term "spring water" at all. For example, Vermont Pure alleges that Nestlé falsely or misleadingly represents Poland Spring water as coming from the actual Poland Spring in Maine and falsely advertises the water as originating in "some of the most pristine and protected sources deep in the woods of Maine." Thus, I deny Nestlé's motion to dismiss as to these allegations.[15]

C. State Law Claims

The reasoning barring Vermont Pure's Lanham Act claims based on the term "spring water" applies with equal, if not more, force to the state law claims.[16] As noted above, 21 U.S.C. § 343-1

[15]I note that if Vermont Pure's allegations that Nestlé falsely or misleadingly represents that Poland Spring water comes from the actual Poland Spring solely by virtue of its brand name, the claim would likely fail because there is no representation of fact. However, for the purposes of a motion to dismiss, I find the allegations sufficient.

[16]Nestlé did not brief any substantive legal issues as to the state law claims in its opening brief but rather asked this Court to decline to exercise supplemental jurisdiction over them, presumably on the assumption that with the federal Lanham Act claims dismissed there would be no independent jurisdiction for this court to entertain the state claims. Because I find the complaint, even without a "spring water" claim, alleges arguably false and misleading advertising regarding defendant's water, the federal claim remains and there is no occasion separately to

establishes the FDCA and its accompanying regulations as the exclusive source of definitions and requirements for the food and drugs regulated by the statute. As such, they cannot be altered or refined by any state action or legislation, and I decline here to impose a judicially-created definition of "spring water" based on state unfair competition statutes. Accordingly, I dismiss Vermont Pure's state law claims to the extent they are based on Nestlé's use of the term "spring water."

III. CONCLUSION

For the reasons set forth more fully above, Nestlé's motion to dismiss is GRANTED in part and DENIED in part. Vermont Pure shall within 20 days of the entry of this Memorandum and Order

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consider exercise of supplemental jurisdiction.

file an amended complaint deleting assertion of claims based on the contention that defendant's water is not "spring water."

/s/ Douglas P. Woodlock
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DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE